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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 298

PEYTON PACKING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (S. R. 134–137)[1] is reported in 142 F. (2d) 1009. The findings of fact, conclusions of law, and order of the Board (R. 67–103) are reported in 49 N. L. R. B. 828, and the Board's supplemental decision and

[1] References to Volume I of the record, which contains the formal proceedings before the Board, are designated herein "(R.)"; references to the supplementary record of proceedings before the court below are designated "(S. R. —)"; references to portions of the record printed as an appendix to the Board's brief in the court below are designated "(B. A. —)"; and references to portions of the record printed as an appendix to the petitioner's brief in the court below are designated "(P. A. —)."

order (R. 120–123) is reported in 50 N. L. R. B. 355.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on July 10, 1944 (S. R. 138–140). The petition for a writ of certiorari was filed on July 28, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

The petition (pp. 8–10) purports to set out four distinct questions but, in our view, only one question is presented:

Whether there is substantial evidence to support the Board's findings that petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and its findings that petitioner discouraged membership in a labor organization by discriminatorily discharging nine of its employees, thereby violating Section 8 (1) and (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10.

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

* * * * *

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on May 18, 1943, issued its findings of fact, conclusions of law, and order (R. 67–103), which were subsequently amended in a supplemental decision and order issued on June 10, 1943 (R. 120–123). The facts may be briefly summarized as follows:

Petitioner is engaged in meat packing at El Paso, Texas, and employs about 370 persons (R.

11, 18, B. A. 60–61). On January 30, 1941, shortly after the issuance of an intermediate report in a prior Board proceeding against petitioner, the Employees' Association of the Peyton Packing Co. (hereinafter called the Association), having been found company dominated by the trial examiner, disbanded (32 N. L. R. B. 595, 596–597, 609, n. 11). After the Board issued its decision on June 11, 1941,[2] also finding company domination, petitioner, on September 23rd of that year, posted notices in substantial compliance with the Board's order (B. A. 61, 69–70).

The Union, which filed the charges in the instant case,[3] commenced an organizational drive among petitioner's employees in October or November 1941 (B. A. 2, 131), and petitioner's officials soon became aware of this development (B. A. 72–74, 131, 135, 142). During the succeeding months, an active campaign against the Union, led by petitioner's personnel manager, Gandara,[4] and participated in by foremen and assistant foremen, was carried on (B. A. 8, 9, 14–

[2] Matter of Peyton Packing Company, Inc., 32 N. L. R. B. 595, 598–604, 610.

[3] Amalgamated Meat Cutters and Butcher Workmen of North America, affiliated with the American Federation of Labor (R. 67, 70).

[4] Gandara, in addition to his position as personnel manager (B. A. 73, 85, 86, 127; see also B. A. 8, 20–21, 89) serves as liaison official between petitioner's officers and its employees by virtue of the fact that he speaks both English and Spanish. The officers speak no Spanish while most of the employees are Mexicans who speak no English (B. A. 86, 89, 20–21; see also Pet., p. 6).

16, 18, 21–22, 29–30, 32, 43–46, 48–49, 55, 56, 58–60, 122, 128). As the Board found (R. 73–83), the campaign against the Union included outright threats by Personnel Manager Gandara and Foremen Florez and Higdon of discharge or other discrimination because of union activities (B. A. 9, 43–44, 56, 58–59), attempts by Gandara and Aguilar, who acted as Gandara's agent in this regard,[5] to ascertain the extent of union activities by questioning employees about their own union membership and that of others (B. A. 8, 9, 18, 21–22, 29–30, 48–49, 55, 114, 122), and frank warnings that petitioner knew the identity of the union members because it had "men in that union who go to the meetings and come * * * and tell * * * everything that goes on * * *" (B. A. 14–15, 55, 59–60). Some employees were asked by Personnel Manager Gandara and by Aguilar to report on events at Union meetings (B. A. 9, 15–16), and others were expressly told not to join the Union (B. A. 9, 15–16, 32). In addition, petitioner, as the Board properly found (R. 86), obtained and received reports of the Union's meet-

[5] The Board's finding that petitioner was responsible for the activities of Aguilar (R. 85–86), rested on evidence that Aguilar was an active officer of the company-dominated Association (B. A. 118), that he was a close friend of Gandara who directed petitioner's activities in opposition to the Union (B. A. 118), and that Aguilar was following Gandara's express instructions when he assisted Gandara in conducting an investigation, on behalf of petitioner, of violations of its rule against solicitation (*infra*, pp. 7–9, B. A. 121, 127–128, 132).

ings (B. A. 1–2, 14–15, 55, 59–60, 137–138; 32 N. L. R. B. 595, 605–606).

On January 26, 1942, shortly after petitioner's officials became aware of the Union's efforts to organize the employees, the following notice was posted throughout the plant (B. A. 64, 141):

> NOTICE TO ALL EMPLOYEES
>
> No employee shall engage in solicitation of any kind while on property of this company, or while working on company time. Disregard of this rule will result in immediate discharge, and no exceptions will be made.

There is no evidence that any effort was made to enforce this rule during the succeeding four months. In May, however, the Union's organizing drive reached its peak (B. A. 2) and, as the Board properly found (R. 90), petitioner was aware of this development through its receipt of reports of the Union's activities (*supra,* p. 5). Moreover, beginning about May 11, 1942, Union Organizer Williams made repeated attempts to communicate by phone with J. C. Peyton, chairman of petitioner's board of directors, for the purpose of setting a date for a collective bargaining conference (B. A. 2–3). When he finally reached Peyton on May 19, the latter told him curtly that he had nothing to discuss with him (B. A. 3). That afternoon Williams wrote to petitioner stating that the Union represented a majority of the employees and requesting that a

date for a conference be set to negotiate a contract (B. A. 3, 139). On May 21, 1942, Peyton replied on behalf of petitioner, stating in part (B. A. 140):

> Should the time ever arrive when a majority of our employees believe that it is necessary for someone else to do for them what they have heretofore satisfactorily done for themselves by way of conference and free discussion with the management, and we are furnished with proof that such is the desire of the majority, you may rest assured that we will properly meet that situation when and if it arises.
>
> So long as you do not represent anyone having legitimate business with us, so far as we know, you must surely understand that no useful purpose could be served by granting you an interview.

Shortly before May 15, during the period when Williams was trying to communicate with Peyton, petitioner's Vice-President Harris directed Gandara to investigate violations of the rule against solicitation by members of the Union (B. A. 64–65, 74–75, 92, 135). Gandara selected Aguilar, who had theretofore openly evinced anti-union bias, to assist him in this task (B. A. 121, 124, 128). Gandara and Aguilar questioned employees throughout the plant as to whether or not they had been solicited to join the Union at some unspecified time and place on petitioner's premises (B. A. 128, 48–49, 96–97, 99–100, 109–110, 113–

114). There is no evidence that either Gandara or Aguilar investigated possible solicitation for organizations other than the Union (see B. A. 110).[6]

Gandara reported to Vice-President Harris the names of certain Union members whom he charged with having violated the rule against solicitation (B. A. 65, 75–76). Those so charged were called in for personal interviews before an inquisitorial board composed of petitioner's president, L. F. Miles, two of its vice presidents, H. B. Harris and S. N. Chauvet, its plant superintendent, W. A. Kessler, and Gandara (B. A. 10, 23, 26–27, 30–31, 34, 36, 38–39, 44, 47, 52, 65). In the presence of a stenographer who made a record of the interviews, the employees were asked whether they had solicited on behalf of the Union at some unspecified time or place on petitioner's premises (B. A. 11, 24, 27, 31, 34, 37, 39, 45, 47; see also B. A. 65, 75–76, 89). None of the employees, however, was confronted with the evidence which formed the basis of the charges against him, nor were the workers upon whose statements the charges were based called in for questioning by petitioner's officials during the conduct of this

[6] The testimony that petitioner refused to permit solicitation by political candidates, representatives of charitable organizations, a life insurance agent, and war bond committees—all strangers in the plant—does not tend to show that in this case the rule against solicitation by employees was not enforced with an intent to prevent self-organization (P. A. 67–69, 77).

inquiry (B. A. 13, 27, 37, 75–77, 89, 91–92, 99–100, 111, 112) In the face of denials by many of the employees involved (B. A. 11–12, 13, 24, 31, 34, 35, 37, 39), petitioner's officials merely accepted the hearsay allegations of Gandara despite his known anti-union bias (B. A. 75–77, 79–81, 89–90, 91–92, 99–100, 111–112).

Four employees (Mena, Ochoterena, Diaz, and Quintana) were discharged immediately after their hearings (B. A. 27, 37, 46–47, 52). Five others (Lopez, Barreda, Arciniaga, Alarcon, and Renteria) were dismissed a few days later after petitioner's officials had allegedly "satisfied" themselves by further "investigation" that the charges against them were true (B. A. 10–11, 13, 24–25, 30–31, 33–34, 38–39, 65–67, 79–81, 133–134).

The investigation thus conducted to discover prior violations of a plant rule was unprecedented in petitioner's plant. Thus, no employee had been discharged for violation of petitioner's rule against smoking unless he was actually seen to be smoking (B. A. 133, 67, 83–84), and Gandara was quite unable to explain why this same rule was not applied with respect to solicitation on behalf of the Union (B. A. 132–133).

Most of the discharged employees had been in petitioner's employ for many years; the term of employment in some cases was as high as 18 and 19½ years (B. A. 22, 36, 38, 28, 33, 5, 26, 51–52, 47).

Petitioner contended before the Board that its promulgation of the rule against solicitation in January 1942, shortly after the Union's organizing drive was commenced, was prompted by the fact that in the earlier Board proceeding against it (*supra*, p. 4) the Board had predicated its finding of illegal company-domination in part on the fact that petitioner had permitted activity on behalf of the dominated union during working hours. It sought to attribute the lapse of seven months between the date of the Board's order and the promulgation of the rule to the fact that in January 1942, when the rule was posted, this Court had just issued its first decision in the *Virginia Electric Power* case,[7] on which compliance with the checked-off dues reimbursement provisions of the Board's order had, by agreement, been made dependent (R. 20–21, B. A. 62–63, 72–73, 86–87; see also Pet., pp. 4–5, 17, 20). However, the first decision of this Court in the *Virginia Electric* case announced no rule concerning solicitation either on company time or premises (B. A. 72), and, in any event, the Board's earlier decision against petitioner dealt with activity on company time, not on the employees' own time (32 N. L. R. B. 595, 599, 601, 602, 604).

Petitioner further contended that its sudden sweeping enforcement of the rule in May 1942 was prompted not by the fact that the Union had

[7] *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469.

at that time reached the peak of its organizing drive, but by a complaint made by an employee named Muro which, it is claimed, apprised petitioner for the first time that its rule was being violated (B. A. 64–65, 74–75, 115; see also Pet., pp. 5–6, 20). Petitioner's witnesses, however, admitted that petitioner had been advised of violations of the rule prior to the time of Muro's complaint (B. A. 129, 98–100).

On these facts, the Board found that petitioner had interfered with, restrained, and coerced its employees in the exercise of their statutory rights in violation of Section 8 (1) of the Act by the activity of Gandara, Aguilar, and other representatives described above, by obtaining and receiving reports of the Union's meetings, and by its discriminatory promulgation and enforcement of the no-solicitation rule (R. 86, 101), and that it had discriminated in respect to hire and tenure of employment in violation of Section 8 (3) and (1) of the Act by discharging the nine employees because of their union activity (R. 92, 101). The Board's finding that petitioner's promulgation and enforcement of the rule against solicitation violated Section 8 (1) of the Act rested on two independent grounds: (1) that a rule which forbids solicitation on behalf of a union on the employee's own time constitutes an illegal interference with the employees' right to self-organization unless justified by special circumstances, absent here, which make the rule necessary in order to

maintain production or discipline (R. 87–88); and (2) that petitioner's motive in promulgating and enforcing the rule was to prevent the self-organization of its employees (R. 88–92). The Board's order (R. 101–103), as amended (R. 120–123), directed petitioner to cease and desist from its unfair labor practices, to offer reinstatement to seven of the nine discharged employees, excluding two employees who had stated that they did not desire reinstatement, to make whole all of the discharged employees by paying them the wages lost because of their discriminatory discharges, and to post appropriate notices.

On March 1, 1944, the Board filed in the court below its petition for enforcement of its order. On June 21, 1944, the court handed down its decision enforcing the Board's order (S. R. 134–137). The court stated that "the rule against solicitation, though reasonable and in lawful form, was administered not according to its tenor but in an arbitrary and discriminatory manner" (S. R. 136). It therefore upheld the Board's findings that the discharges were discriminatory "in that they resulted from union membership and activity" (S. R. 137). On July 10, 1944, the court entered a decree enforcing the Board's order in full (S. R. 138–140).

ARGUMENT

1. The decision of the court below does not, as petitioner contends (Pet., pp. 16–17), conflict with

Midland Steel Products Co. v. *National Labor Relations Board,* 113 F. (2d) 800, 805 (C. C. A. 6) or *National Labor Relations Board* v. *William Davies Co.,* 135 F. (2d) 179, 183 (C. C. A. 7), certiorari denied, 320 U. S. 770. In neither of those cases was it denied that promulgation or enforcement of a plant rule is an unfair labor practice if prompted by hostility to, and an intent to interfere with, self-organization, and in each the circuit court of appeals' reversal of the Board's finding of discrimination was based on the absence of evidence of illegal intent. The circuit courts of appeals have uniformly held that a plant rule which is adopted "as a device to obstruct or impede self-organization," and discharges made pursuant thereto, are illegal, *National Labor Relations Board* v. *Denver Tent and Awning Co.,* 138 F. (2d) 410, 411 (C. C. A. 10); *Carter Carburetor Corp.* v. *National Labor Relations Board,* 140 F. (2d) 714, 716, 717 (C. C. A. 8); *National Labor Relations Board* v. *Glenn L. Martin-Nebraska Co.,* 141 F. (2d) 371, 373 (C. C. A. 8). Similarly, the enforcement of an otherwise valid rule in a manner designed to crush union activities is prohibited under the Act. *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 330–333; *Shell Oil Co.* v. *National Labor Relations Board,* 128 F. (2d) 206, 207 (C. C. A. 5); *National Labor Relations Board* v. *National Traffic Guard Co.,* 135 F. (2d) 42, 43 (C. C. A. 5).

The Board here found that petitioner's "purpose in promulgating and enforcing the rule, was to prevent the self-organization of its employees" (R. 89). Since the Board's order was upheld by the court below solely on that ground (S. R. 136–137), there is not here presented the question whether the Board may properly hold that a rule against solicitation on company premises but on the employees' own time is improper, in the absence of special circumstances indicating its necessity. Although the Board in the instant case decided the latter question as an alternative ground for its decision, its order, unlike that in *Republic Aviation Corporation* v. *National Labor Relations Board,* No. 226, this Term, does not require that the petitioner rescind the rule against solicitation (R. 101–103, 120–123), and the court's holding certainly eliminates that question from the case.[8]

2. Whether there is substantial evidence to support the Board's finding that petitioner's promulgation and enforcement of the rule against solicitation was illegally motivated (Pet., pp. 8–10, 11, 19–22) presents no question of general

[8] That question is presented in *Republic Aviation Corporation* v. *National Labor Relations Board*, No. 226, this Term, petition for writ of certiorari filed on July 5, 1944. In that case, the Solicitor General, on behalf of the Board, has filed a memorandum stating that he does not oppose the granting of the petition. The propriety of the decision below in the instant case, however, is in no way dependent on the disposition of the *Republic Aviation* case by this Court, for the reasons stated above.

importance. Moreover, the evidence summarized in the Statement affords full support for this finding, as the court below held (S. R. 136–137).[9]

3. Petitioner contends (Pet., pp. 9, 11, 14, 18–19) that the Board erred in giving weight to Peyton's letter of May 21 (*supra*, p. 7) in arriving at its conclusion concerning petitioner's hostility to the Union. The Board did not find that the sending of this letter was an unfair labor practice, nor did it indicate in any way that petitioner was under a duty to bargain with the Union without requiring a showing of majority status. It merely took into consideration the fact that the tenor of the letter as a whole was manifestly hostile (R. 73, 85, 91). Hence petitioner is in error in asserting a conflict with *Texarkana Bus Co.* v. *National Labor Relations Board*, 119 F. (2d) 480 (C. C. A. 8); *National Labor Relations Board* v. *Empire Furniture Corp.*, 107 F. (2d) 92 (C. C. A. 6); and *North Electric Manufacturing Co.* v. *National Labor Relations Board*, 123 F. (2d) 887 (C. C. A. 6), certiorari denied, 315 U. S. 818. Those cases hold only that an employer

[9] Cf. *National Labor Relations Board* v. *Denver Tent and Awning Co.*, 138 F. (2d), 410, 411 (C. C. A. 10); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. (2d) 714, 716–717 (C. C. A. 8); *American Smelting & Refining Co.* v. *National Labor Relations Board*, 128 F. (2d) 345, 347 (C. C. A. 5); *Shell Oil Co.* v. *National Labor Relations Board*, 128 F. (2d) 206, 207 (C. C. A. 5); *National Labor Relations Board* v. *Kentucky Fire Brick Co.*, 99 F. (2d) 89, 92–93 (C. C. A. 6).

may demand proof of majority status before granting a union's request that it be recognized as bargaining agent for the employees. Moreover, the Board's order is fully supported without regard to this evidence.

4. Petitioner's various objections to the Board's findings of coercive activities on the part of petitioner's representatives (Pet., pp. 22–28) raise no question of general importance warranting review by this Court. Moreover, the evidence summarized above fully supports the Board's findings in this respect. Indeed, its order requiring petitioner to cease and desist from its interference, restraint, and coercion could rest alone on the express threats of economic reprisal voiced by Personnel Manager Gandara (B. A. 9, 59), or upon his activities in questioning employees about their union activities (B. A. 9, 21–22,, 114).[10] In view of Gandara's peculiar status in the plant (*supra,* p. 4, n. 4) he was, in a literal sense, in a "strategic position to translate to [his] subordinates the policies and desires of the management." *International Ass'n of Machinists v. National Labor Relations Board,* 311 U. S. 72, 80. In such

[10] See *e. g., H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518, 520; *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 181 (C. C. A. 7), certiorari denied, 320 U. S. 770; *Texarkana Bus Co.* v. *National Labor Relations Board*, 119 F. (2d) 480, 483 (C. C. A. 8); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 592–593 (C. C. A. 7).

a situation, any instructions which petitioner may have given to its supervisors which are not shown to have been communicated to the employees themselves (Pet., pp. 4, 27) could not have mitigated the coercive effect of Gandara's conduct. *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 519, 521. Nor was the petitioner relieved of responsibility, as it contends (Pet., pp. 3-4, 27), by the general notice posted by it during the preceding year in compliance with the Board's earlier order not to support the Association and interfere with self-organization of its employees. Cf. *Solvay Process Co.* v. *National Labor Relations Board,* 117 F. (2d) 83, 85 (C. C. A. 5), certiorari denied, 313 U. S. 596.

CONCLUSION

The decision below is correct and presents no conflicts of decisions or questions of general importance warranting review by this Court. The petition should therefore be denied.

Respectfully submitted.

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AUGUST 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944